

National Security Letters in Foreign Intelligence Investigations: Legal Background

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Summary

Five federal statutes authorize intelligence officials to request certain business record information in connection with national security investigations. The authority to issue these national security letters (NSL) is comparable to the authority to issue administrative subpoenas. The USA PATRIOT Act (P.L. 107-56) expanded the authority under the original four NSL statutes and created a fifth. Thereafter, the authority was reported to have been widely used. Then, a report by the Department of Justice's Inspector General (IG) found that in its use of expanded USA PATRIOT Act authority the FBI had "used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies," although it concluded that no criminal laws had been broken. A year later, a second IG report confirmed the findings of the first, and noted the corrective measures taken in response. A third IG report, critical of the FBI's use of exigent letters and informal NSL alternatives, noted that the practice had been stopped and related problems addressed.

The USA PATRIOT Improvement and Reauthorization Act (P.L. 109-177, and its companion, P.L. 109-178) amended the five NSL statutes to expressly provide for judicial review of both the NSLs and the confidentiality requirements that attend them. The sections were made explicitly subject to judicial enforcement and to sanctions for failure to comply with an NSL request or to breach NSL confidentiality requirements. Prospects of its continued use dimmed, however, after two lower federal courts held that the absolute confidentiality requirements and the limitations on judicial review rendered one of the NSL statutes constitutionally suspect.

The President's Review Group on Intelligence and Communications Technologies recommended several NSL statutory adjustments designed to eliminate differences between NSLs and court orders under the Foreign Intelligence Surveillance Act ("§215 orders"), including requiring pre-issuance judicial approval of NSLs. Instead in the USA FREEDOM Act, P.L. 114-23 (H.R. 2048), Congress opted to adjust the NSL judicial review provisions governing the nondisclosure requirements which may accompany NSLs. It also precludes the use of NSL authority for bulk collection of communications or financial records. Finally, it adjusts existing reporting requirements to permit recipients to publicly disclose the extent to which they have been compelled to comply with NSLs.

The text of the five NSL statutory provisions has been appended. This report is available abridged—without footnotes, appendices, and most of the citations to authority—as CRS Report RS22406, *National Security Letters in Foreign Intelligence Investigations: A Glimpse at the Legal Background*, by Charles Doyle.

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Introduction

Five statutory provisions vest government agencies responsible for certain foreign intelligence investigations (principally the Federal Bureau of Investigation (FBI)) with authority to issue written commands comparable to administrative subpoenas.¹ A National Security Letter (NSL) seeks customer and consumer transaction information in national security investigations from communications providers, financial institutions, and credit agencies. Over the years, Congress has struggled with efforts to ensure the effectiveness of the NSL authority, while guarding against its abuse.

Background

NSL authority began with dissatisfaction with the exception to the privacy provisions of the Right to Financial Privacy Act (RFPA).² Congress initially acted, without a great deal of analysis on the record, to be sure the exception was not too broadly construed.³ But the exception was just that, an exception. It was neither an affirmative grant of authority to request information nor a command to financial institutions to provide information when asked. It removed the restrictions on the release of customer information imposed on financial institutions by the Right to Financial Privacy Act, but it left them free to decline to comply when asked to do so.

[I]n certain significant instances, financial institutions [had] declined to grant the FBI access to financial records in response to requests under [S]ection 1114(a). The FBI informed the Committee that the problem occurs particularly in States which have State constitutional privacy protection provisions or State banking privacy laws. In those States, financial institutions decline to grant the FBI access because State law prohibits them from granting such access and the RFPA, since it permits but does not mandate such access, does not override State law. In such a situation, the concerned financial institutions which might otherwise desire to grant the FBI access to a customer's record will not do so, because State law does not allow such cooperation, and cooperation might expose them to liability to the customer whose records the FBI sought access.⁴

¹ 18 U.S.C. 2709; 12 U.S.C. 3414; 15 U.S.C. 1681v; 15 U.S.C. 1681u; 50 U.S.C. 3162 (prior to recent reclassification, this section was found in 50 U.S.C. 436); the text of each is appended.

Federal administrative subpoena authority is discussed in U.S. Department of Justice, Office of Legal Policy, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities* [2002], available on March 6, 2006 at <http://www.usdoj.gov/olp/intro.pdf>; see also CRS Report RL33321, *Administrative Subpoenas in Criminal Investigations: A Brief Legal Analysis*, abridged as CRS Report RS22407, *Administrative Subpoenas in Criminal Investigations: A Sketch*, both by Charles Doyle.

² Section 1114, P.L. 95-630, 92 Stat. 3706 (1978); now codified at 12 U.S.C. 3414(a)(1) (A), (B): “Nothing in this chapter (except [S]ections 3415, 3417, 3418, and 3421 of this title) shall apply to the production and disclosure of financial records pursuant to requests from—(A) a Government authority authorized to conduct foreign counter- or foreign positive- intelligence activities for purposes of conducting such activities; [or] (B) the Secret Service for the purpose of conducting its protective functions (18 U.S.C. 3056; 3 U.S.C. 202, P.L.90-331, as amended).”

³ “Section 1114 provides for special procedures in the case of foreign intelligence ... though the committee believes that some privacy protections may well be necessary for financial records sought during a foreign intelligence investigation, there are special problems in this area which make consideration of such protections in other congressional forums more appropriate. Nevertheless, the committee intends that this exemption be used only for legitimate foreign intelligence investigations: investigations proceeding only under the rubric of “national security” do not qualify. Rather this exception is available only to those U.S. Government officials specifically authorized to investigate the intelligence operations of foreign governments,” H.Rept. 95-1383, at 55 (1978).

⁴ H.Rept. 99-690, at 15-6 (1986).

Congress responded with passage of the first NSL statute as an amendment to the Right to Financial Privacy Act, affirmatively giving the FBI access to financial institution records in certain foreign intelligence cases.⁵ At the same time in the Electronic Communications Privacy Act, it afforded the FBI comparable access to the telephone company and other communications service provider customer information.⁶ Together the two NSL provisions afforded the FBI access to communications and financial business records under limited circumstances—customer and customer transaction information held by telephone carriers and banks pertaining to a foreign power or its agents relevant to a foreign counter-intelligence investigation.⁷

Both the communications provider section and the Right to Financial Privacy Act section contained nondisclosure provisions⁸ and limitations on further dissemination except pursuant of guidelines promulgated by the Attorney General.⁹ Neither had an express enforcement mechanism nor identified penalties for failure to comply with either the NSL or the nondisclosure instruction.

In the mid-1990s, Congress added two more NSL provisions—one permits NSL use in connection with the investigation of government employee leaks of classified information under the National Security Act;¹⁰ and the other grants the FBI access to credit agency records pursuant to the Fair Credit Reporting Act, under much the same conditions as apply to the records of financial institutions.¹¹ The FBI asked for the Fair Credit Reporting Act amendment as a threshold mechanism to enable it to make more effective use of its bank record access authority:

FBI's right of access under the Right of Financial Privacy Act cannot be effectively used, however, until the FBI discovers which financial institutions are being utilized by the subject of a counterintelligence investigation. Consumer reports maintained by credit bureaus are a ready source of such information, but, although such report[s] are readily available to the private sector, they are not available to FBI counterintelligence investigators....

FBI has made a specific showing ... that the effort to identify financial institutions in order to make use of FBI authority under the Right to Financial Privacy Act can not only be time-consuming and resource-intensive, but can also require the use of investigative techniques—such as physical and electronic surveillance, review of mail covers, and canvassing of all banks in an area—that would appear to be more intrusive than the review of credit reports. H.Rept. 104-427, at 36 (1996).¹²

The National Security Act NSL provision authorized access to credit and financial institution records of federal employees with security clearances who were required to give their consent as

⁵ P.L. 99-569, §404, 100 Stat. 3197 (1986); 12 U.S.C. 3414(a)(5)(A)(1988 ed.).

⁶ 18 U.S.C. 2709 (1988 ed.); *see also*, S.Rept. 99-541, at 43 (1986) (“This provision is substantially the same as language recently reported by the Intelligence Committee as [S]ection 503 of the Intelligence Authorization Act for Fiscal Year 1987, [P.L. 99-569]”).

⁷ 18 U.S.C. 2709 (1988 ed.); 12 U.S.C. 3414(a)(5)(A)(1988 ed.).

⁸ 18 U.S.C. 2709(c) (“No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section”); *see also*, 12 U.S.C. 3414(a)(5)(D). Note that unlike Section 3486, the prohibition is neither temporary nor judicially supervised.

⁹ 18 U.S.C. 2709(d)(1988 ed.); 12 U.S.C. 3414(a)(5)(B)(1988 ed.).

¹⁰ 50 U.S.C. 3162.

¹¹ 15 U.S.C. 1681u.

¹² The Senate Intelligence Committee had made similar observations in a prior Congress when considering legislation that ultimately became the National Security Amendment, H.Rept. 103-256, at 17-22 (1994).

a condition for clearance.¹³ Passed in the wake of the Ames espionage case, it is limited to investigations of classified information leaks. As noted at the time, “The Committee believes section 801 will serve as a deterrent to espionage for financial gain without burdening investigative agencies with unproductive recordkeeping or subjecting employees to new reporting requirements.... The Committee recognizes that consumer credit records have been notoriously inaccurate, and expects that information obtained pursuant to this [S]ection alone will not be the basis of an action or decision adverse to the interest of the employee involved.”¹⁴

Both the Fair Credit Reporting Act section and the National Security Act section contain dissemination restrictions;¹⁵ as well as safe harbor (immunity),¹⁶ and nondisclosure provisions.¹⁷ Neither has an explicit penalty for improper disclosure of the request, but the Fair Credit Reporting Act section expressly authorizes judicial enforcement.¹⁸

USA PATRIOT Act

The USA PATRIOT Act amended three of the four existing NSL statutes and added a fifth. In each of the three NSL statutes available exclusively to the FBI—the Electronic Communications Privacy Act section (18 U.S.C. 2709), the Right to Financial Privacy Act section (12 U.S.C. 3414(a)(5)), and the Fair Credit Reporting Act section (15 U.S.C. 1681u) (§505 of the USA PATRIOT Act)

- expanded FBI issuing authority beyond FBI headquarter officials to include the heads of the FBI field offices (i.e., Special Agents in Charge (SAC));
- eliminated the requirement that the record information sought pertain to a foreign power or the agent of a foreign power;
- required instead that the NSL request be relevant to an investigation to protect against international terrorism or foreign spying;
- added the caveat that no such investigation of an American can be predicated exclusively of First Amendment protected activities.¹⁹

The amendments allowed NSL authority to be employed more quickly (without the delays associated with prior approval from FBI headquarters) and more widely (without requiring that the information pertain to a foreign power or its agents).²⁰

¹³ 50 U.S.C. 456 (1994 ed.).

¹⁴ H.Rep.No.103-541 at 53-4 (1994).

¹⁵ 15 U.S.C. 1681u(f), 50 U.S.C. 3162(e).

¹⁶ 15 U.S.C. 1681u(k), 50 U.S.C. 3162(c).

¹⁷ 15 U.S.C. 1681u(d); 50 U.S.C. 3162(b).

¹⁸ 15 U.S.C. 1681u(c).

¹⁹ P.L. 107-56, §505, 115 Stat. 365-66 (2001).

²⁰ “The information acquired through NSLs is extremely valuable to national security investigations.... Unfortunately, however, NSLs were of limited utility prior to the PATRIOT Act. While records held by third parties may generally be subpoenaed by a grand jury in a criminal investigation so long as those records are relevant, the standard for obtaining such records through an NSL was much higher before October of 2001.

“The FBI had to have specific and articulable facts that the information requested pertained to a foreign power or an agent of a foreign power. This requirement often prohibited the FBI from using NSLs to develop evidence at the early stage of an investigation, which is precisely when they are the most useful.

“The prior standard, Mr. Chairman, put the cart before the horse. Agents trying to determine whether or not there were specific and articulable facts that a certain individual was a terrorist or spy were precluded from using an NSL in this

Subsection 358(g) of the USA PATRIOT Act amended the Fair Credit Reporting Act to add a fifth and final NSL section; the provision had one particularly noteworthy feature, it was available not merely to the FBI but to any government agency investigating or analyzing international terrorism:

Notwithstanding [S]ection 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish a consumer report of a consumer and all other information in a consumer's file to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct or such investigation, activity or analysis.²¹

Although the subsection's legislative history treats it as a matter of first impression,²² Congress's obvious intent was to provide other agencies with the national security letter authority comparable to that enjoyed by the FBI under the Fair Credit Reporting Act. The new section had a nondisclosure and a safe harbor subsection,²³ but no express means of judicial enforcement or penalties for improper disclosure of a request under the section.

Early Judicial Reaction

Two court decisions colored the debate over NSL authority, which culminated in enactment of the 2006 USA PATRIOT Act reauthorization statutes.²⁴ *Doe v. Gonzales*²⁵ suggested that the NSL statutes could not withstand constitutional scrutiny under the First Amendment unless more explicit accommodations were made for judicial review and permissible disclosure by recipients. *Doe v. Ashcroft*²⁶ had earlier reached much the same conclusion on the First Amendment and

inquiry because, in order to use an NSL, they first had to be in possession of such facts.

"Suppose, for example, investigators were tracking a known al-Qaeda operative and saw him having lunch with three individuals. A responsible agent would want to conduct a preliminary investigation of those individuals and find out, among other things, with whom they had recently been in communication.

"Before the passage of the PATRIOT Act, however, the FBI could not have issued an NSL to obtain such information. While investigators could have demonstrated that this information was relevant to an ongoing terrorism investigation, they could not have demonstrated sufficient specific, and articulable facts that the individuals in question were agents of a foreign power," *Material Witness Provisions of the Criminal Code, and the Implementation of the USA PATRIOT Act: Section 505 That Addresses National Security Letters, and Section 804 That Addresses Jurisdiction Over Crimes Committed at U.S. Facilities Abroad: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. at 9-10 (2005) (testimony of Matthew Berry, Office of Legal Policy, U.S. Department of Justice).

²¹ P.L. 107-56, §358(g), 115 Stat. 327 (2001).

²² E.g., H.Rept. 107-250, at 60-1 ("This section facilitates government access to information contained in suspected terrorists' credit reports when the government inquiry relates to an investigation, of or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lender and insurers can access an individual's credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist's plan or source of refunding—without notifying the target").

²³ 15 U.S.C. 1681v(c), (e).

²⁴ The USA PATRIOT Improvement and Reauthorization Act, P.L. 109-177, 120 Stat. 192 (2006), and the USA PATRIOT Act Reauthorization Amendments Act, P.L. 109-178, 120 Stat. 278 (2006).

²⁵ 386 F.Supp.2d 66 (D.Conn. 2005), *dism'd as moot*, 449 F.3d 415 (2d Cir. 2006).

²⁶ 334 F.Supp.2d 471 (S.D.N.Y. 2004), *vac'd and remanded*, 449 F.3d 415 (2d Cir. 2006), *after remand*, 500 F.Supp.2d 379 (S.D.N.Y. 2007), *aff'd in part, rev'd in part and remanded*, 549 F.3d 861 (2d Cir. 2008), *after remand*, 665

raised Fourth Amendment issues as well. In essence, *Doe v. Ashcroft* found that the language of communications NSL statute²⁷ and the practices surrounding its use offended (1) the Fourth Amendment because “in all but the exceptional case it [had] the effect of authorizing coercive searches effectively immune from any judicial process,”²⁸ and (2) the First Amendment because its sweeping, permanent secrecy order feature applied “in every case, to every person, in perpetuity, with no vehicle for the ban to ever be lifted from the recipient or other persons affected under any circumstances, either by the FBI itself, or pursuant to judicial process.”²⁹

NSL Amendments in the 109th Congress

Both USA PATRIOT Act reauthorization statutes amended the NSL statutes. Their amendments:

- created a judicial enforcement mechanism and a judicial review procedure for both the requests and accompanying nondisclosure requirements;³⁰
- established specific penalties for failure to comply or to observe the nondisclosure requirements;³¹
- made it clear that the nondisclosure requirements did not preclude a recipient from consulting an attorney;³²
- provided a process to ease the nondisclosure requirement;³³
- expanded congressional oversight;³⁴
- called for an Inspector General’s audit of use of the authority.³⁵

Inspector General’s Reports

The First IG Report

The statutorily directed Department of Justice Inspector General audit reports, one released in March of 2007, the second in March of 2008, and the third in January of 2010, were less than totally favorable.³⁶ The first report noted that FBI use of NSLs had increased dramatically, expanding from 8,500 requests in 2000 to 47,000 in 2005, *IG Report I* at 120. During the three years under review, the percentage of NSLs used to investigate Americans (“U.S. persons”)

F.Supp.2d 426 (S.D.N.Y. 2009); see also, *Doe v. Holder*, 703 F.Supp.2d. 313 (S.D.N.Y. 2010).

²⁷ 18 U.S.C. 2709.

²⁸ 334 F.Supp.2d at 506.

²⁹ *Id.* at 476.

³⁰ 28 U.S.C. 3511.

³¹ 28 U.S.C. 3511(c), 18 U.S.C. 1510(e).

³² 12 U.S.C. 3414((a)(3)(A)); 15 U.S.C. 1681v(c)(1), 1681u(d)(1); 18 U.S.C. 2709(c)(1); 50 U.S.C.3162(b)(1).

³³ 28 U.S.C. 3511(b).

³⁴ P.L. 109-177, §118.

³⁵ P.L. 109-177, §119.

³⁶ U.S. Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation’s Use of National Security Letters (IG Report I)* (March 2007); *A Review of the FBI’s Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006 (IG Report II)* (March 2008); *A Review of the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records (IG Report III)*, all three available at <http://www.usdoj.gov/oig/special/index.htm>.

increased from 39% in 2003 to 53% in 2005.³⁷ A substantial majority of the requests involved records relating to telephone or e-mail communications, *id.*

The report and the subsequent report a year later provided a glimpse at how the individual NSL statutes were used and why they were considered available. In case of the 18 U.S.C. 2709, the Electronic Communications Privacy Act (ECPA) NSL statute, the reports explained that

Through national security letters, an FBI field office obtained telephone toll billing records and subscriber information about an investigative subject in a counterterrorism case. The information obtained identified the various telephone numbers with which the subject had frequent contact. Analysis of the telephone records enabled the FBI to identify a group of individuals residing in the same vicinity as the subject. The FBI initiated investigations on these individuals to determine if there was a terrorist cell operating in the city.³⁸

Headquarters and field personnel told us that the principal objective of the most frequently used type of NSL—ECPA NSLs seeking telephone toll billing records, electronic communication transactional records, or subscriber information (telephone and e-mail)—is to develop evidence to support applications for FISA orders.³⁹

The Right to Financial Privacy Act (RFPA) NSL statute, 12 U.S.C. 3414(a)(5), also affords authorities access a wide range of information (bank transaction records v. telephone transaction records) as demonstrated by the instances where it proved useful:

The FBI conducted a multi-jurisdictional counterterrorism investigation of convenience store owners in the United States who allegedly sent funds to known Hawaladars (persons who use the Hawala money transfer system in lieu of or parallel to traditional banks) in the Middle East. The funds were transferred to suspected Al Qaeda affiliates. The possible violations committed by the subjects of these cases included money laundering, sale of untaxed cigarettes, check cashing fraud, illegal sale of pseudoephedrine (the precursor ingredient used to manufacture methamphetamine), unemployment insurance fraud, welfare fraud, immigration fraud, income tax violations, and sale of counterfeit merchandise.⁴⁰

The FBI issued national security letters for the convenience store owners' bank account records. The records showed that two persons received millions of dollars from the subjects and that another subject had forwarded large sums of money to one of these individuals. The bank analysis identified sources and recipients of the money transfers and assisted in the collection of information on targets of the investigation overseas.⁴¹

The Fair Credit Reporting Act NSL statutes, 15 U.S.C. 1681u (FCRAu) and 1681v (FCRAv) can be even more illuminating, “The supervisor of a counterterrorism squad told us that the FCRA NSLs enable the FBI to see ‘how their investigative subjects conduct their day-to-day activities,

³⁷ *Id.* A “U.S. person” is generally understood to mean “a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(2) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection(a)(1), (2), or (3) of this section,” 50 U.S.C. 1801.

³⁸ *IG Report I* at 49.

³⁹ *IG Report II* at 65. The Foreign Intelligence Surveillance Act (FISA) authorizes the FBI to apply for court orders in national security cases authorizing electronic surveillance, physical searches, the installation and use of pen registers and trap and trace devices, and access to business records and other tangible property, 50 U.S.C. 1801-1862.

⁴⁰ Critics might suggest that these offenses are “possible” in the operation of any convenience store.

⁴¹ *IG Report I* at 50.

how they get their money, and whether they are engaged in white collar crime that could be relevant to their investigations.”⁴²

Overall, the report notes that the FBI used the information gleaned from NSLs for a variety of purposes, “to determine if further investigation is warranted; to generate leads for other field offices, Joint Terrorism Task Forces, or other federal agencies; and to corroborate information developed from other investigative techniques.”⁴³ Moreover, information supplied in response to NSLs provides the grist of FBI analytical intelligence reports and various FBI databases.⁴⁴

The report was somewhat critical, however, of the FBI’s initial performance:

[W]e found that the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies. In addition, we found that the FBI circumvented the requirements of the ECPA NSL statute when it issued at least 739 “exigent letters” to obtain telephone toll billing records and subscriber information from three telephone companies without first issuing NSLs. Moreover, in a few other instances, the FBI sought or obtained telephone toll billing records in the absence of a national security investigation, when it sought and obtained consumer full credit reports in a counterintelligence investigation, and when it sought and obtained financial records and telephone toll billing records without first issuing NSLs. *Id.* at 124.

More specifically, the report found that

- a “significant number of NSL-related possible violations were not being identified or reported” as required;
- the only FBI data collection system produced “inaccurate” results;
- the FBI issued over 700 exigent letters acquiring information in a manner that “circumvented the ECPA NSL statute and violated the Attorney General’s Guidelines ... and internal FBI policy;”
- the FBI’s Counterterrorism Division initiated over 300 NSLs in a manner that precluded effective review prior to approval;
- 60% of the individual files examined showed violations of FBI internal control policies;
- the FBI did not retain signed copies of the NSLs it issued;
- the FBI had not provided clear guidance on the application of the Attorney General’s least-intrusive-feasible-investigative-technique standard in the case of NSLs;
- the precise interpretation of toll billing information as it appears in the ECPA NSL statute is unclear;
- SAC supervision of the attorneys responsible for review of the legal adequacy of proposed NSLs made some of the attorneys reluctant to question the adequacy of the underlying investigation previously approved by the SAC;
- there was no indication that the FBI’s misuse of NSL authority constituted criminal conduct;
- personnel both at FBI headquarters and in the field considered NSL use indispensable; and

⁴² *Id.* at 51.

⁴³ *Id.* at 65.

⁴⁴ *Id.*

- information generated by NSLs was fed into a number of FBI systems. *IG Report I* at 121-24.

Exigent Letters

Prior to enactment of the Electronic Communications Privacy Act (ECPA), the Supreme Court held that customers had no Fourth Amendment protected privacy rights in the records the telephone company maintained relating to their telephone use.⁴⁵ Where a recognized expectation of privacy exists for Fourth Amendment purposes, the Amendment's usual demands such as those of probable cause, particularity, and a warrant may be eased in the face of exigent circumstances. For example, the Fourth Amendment requirement that officers must knock and announce their purpose before forcibly entering a building to execute a warrant can be eased in the presence of certain exigent circumstances such as the threat of the destruction of evidence or danger to the officers.⁴⁶ Satisfying Fourth Amendment requirements, however, does not necessarily satisfy statutory prohibitions.

The ECPA prohibits communications service providers from supplying information concerning customer records unless one of the statutory exceptions applies.⁴⁷ There are specific exceptions for disclosure upon receipt of a grand jury subpoena⁴⁸ or an NSL.⁴⁹ A service provider who knowingly or intentionally violates the prohibition is subject to civil liability,⁵⁰ but there are no criminal penalties for the breach.

The Inspector General found that contrary to assertions that “the FBI would obtain telephone records only after it served NSLs or grand jury subpoenas, the FBI obtained telephone bill records and subscriber information prior to serving NSLs or grand jury subpoenas” by using “exigent letters.”⁵¹ The FBI responded that it had barred the use of exigent letters, but emphasized that the term “exigent letter” does not include emergency disclosures under the exception now found in 18 U.S.C. 2702(c)(4). Thus, the FBI might request that a service provider invoke that exception to the record disclosure bar “if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information,” 18 U.S.C. 2702(c)(4). Moreover, the Justice Department's Office of Legal Counsel subsequently advised the FBI in a classified memorandum that “under certain circumstances the ECPA does not prohibit electronic communications service providers from disclosing certain call detail records to the FBI on a voluntary basis without legal process or a qualifying emergency under [S]ection 2702.”⁵²

⁴⁵ *Smith v. Maryland*, 442 U.S. 735, 745 (1979)

⁴⁶ *Richards v. Wisconsin*, 520 U.S. 385, 391 (1997); *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995).

⁴⁷ 18 U.S.C. 2702(c).

⁴⁸ 18 U.S.C. 2703(c)(2).

⁴⁹ 18 U.S.C. 2709(a).

⁵⁰ 18 U.S.C. 2707(a).

⁵¹ *IG Report I* at 90.

⁵² *Report by the Office of the Inspector General of the Department of Justice on the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the House Comm. on the Judiciary*, 111th Cong. 2d sess. 22 (2010) (2010 Hearings) (statement of Department of Justice Inspector General Glenn Fine) (referring to a January, 2010 OLC memorandum).

The Second IG Report

The second IG Report reviewed the FBI's use of national security letter authority during calendar year 2006 and the corrective measures taken following the issuance of the IG's first report. The second Report concluded that

- “the FBI's use of national security letters in 2006 continued the upward trend ... identified ... for the period covering 2003 through 2005;
- “the percentage of NSL requests generated from investigations of U.S. persons continued to increase significantly, from approximately 39% of all NSL requests issued in 2003 to approximately 57% of all NSL requests issued in 2006;”
- the FBI and DOJ are committed to correcting the problems identified in *IG Report I* and “have made significant progress in addressing the need to improve compliance in the FBI's use of NSLs;” [and]
- “it [was] too early to definitively state whether the new systems and controls developed by the FBI and the Department will eliminate fully the problems with NSLs that we identified,” *IG Report II* at 8-9.

The Third IG Report

The third IG Report examined the FBI's use of exigent letters and other informal means of acquiring communication service provider's customer records in lieu of relying on NSL authority during the period from 2003 to 2007.⁵³ The IG's Office discovered that “the FBI's use exigent letters became so casual, routine, and unsupervised that employees of all three communications service providers sometimes generated exigent letters for FBI personnel to sign and return to them.”⁵⁴

Some of the informality was apparently the product of proximity. In order to facilitate cooperation, communications providers had assigned employees to FBI offices. In addition to a relaxed exigent letter process, the on-site feature gave rise to a practice of sneak peeks, that is, of providing the FBI with “a preview of the available information for a targeted phone number, without documentation of any justification for the request.”⁵⁵ “In fact, at times the service providers' employees simply invited FBI personnel to view the telephone records on their computer screens. One senior FBI counterterrorism official described the culture of casual requests for telephone records by observing, “It [was] like having the ATM in your living room.”⁵⁶

Not surprisingly, the IG's review “... found widespread use by the FBI of exigent letters and other informal requests for telephone records. These other requests were made ... without first providing legal process or even exigent letters. The FBI also obtained telephone records through improper ‘sneak peeks,’ community of interest [REDACTED], and hot-number [REDACTED]. Many of these practices violated FBI guidelines, Department policy, and the ECPA statute. In addition, we found

⁵³ *IG Report III* at 1.

⁵⁴ *2010 Hearings* at 14 (statement of Department of Justice Inspector General Glenn Fine)

⁵⁵ *Id.* at 15.

⁵⁶ *Id.*

that the FBI also made inaccurate statements to the FISA [(Foreign Intelligence Surveillance Act)] Court related to its use of exigent letters.”⁵⁷

Although critical of the FBI’s initial response and recommending further steps to prevent reoccurrence, the IG’s Report concluded that “the FBI took appropriate action to stop the use of exigent letters and to address the problems created by their use.”⁵⁸

Post-Amendment Judicial Action

Following the 2006 USA PATRIOT Act amendments, the U.S. District Court for the Southern District of New York revisited the issue and concluded that the revised NSL procedures violated both First Amendment and separation of powers principles.⁵⁹ It enjoined Justice Department officials from issuing NSLs under Section 2709, the communications section, or from enforcing compliance with existing orders.⁶⁰ However, it stayed the order pending appeal.⁶¹ The U.S. Court of Appeals for the Second Circuit did not disagree, but concluded that the government could invoke the secrecy and judicial authority of the communications NSL statute,⁶² and the review statute⁶³ in a limited but constitutionally permissible manner.⁶⁴

The issues before the Court of Appeals were (1) whether the nondisclosure features of NSL communications statute should be subject to First Amendment strict scrutiny and (2) whether judicial review subject to the conclusive weight of an executive branch certification under the review section posed constitutional concerns.

The pre-amendment *Doe* cases had concluded that the communications NSL statute, which then broadly prohibited disclosure of receipt of an NSL, “work[ed] as both a prior restraint on speech and a content-based restriction, and hence, [was] subject to strict scrutiny.”⁶⁵ “Under strict scrutiny review,” the Supreme Court had explained, “the Government must demonstrate that the nondisclosure requirement is narrowly tailored to promote a compelling Government interest.”⁶⁶ Moreover, the Court had observed, there can be “no less restrictive alternatives that would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”⁶⁷ When a suspect prior restraint comes in the form of a licensing scheme, under which expression is banned for want of government permission as in *Freedman v. Maryland*, Court precedent suggested that the scheme must include prompt judicial review at the petition and burden of the regulator.⁶⁸

⁵⁷ *Id.* at 288 (redaction in the original).

⁵⁸ *IG Report III* at 289.

⁵⁹ *Doe v. Gonzalez*, 500 F.Supp.2d 379 (S.D.N.Y. 2007), aff’d in part, rev’d in part, and remanded, sub nom., *John Doe, Inc. v. Mukasey*, 549 F.861 (2d Cir. 2008).

⁶⁰ *Doe v. Gonzalez* 500 F.Supp.2d at 425-26.

⁶¹ *Id.* at 426.

⁶² 18 U.S.C. 2709.

⁶³ 18 U.S.C. 3511.

⁶⁴ *John Doe, Inc. v. Mukasey*, 549 F.3d at 883-84.

⁶⁵ *Doe v. Ashcroft*, 334 F.Supp.2d 471, 511 (S.D.N.Y. 2004); *Doe v. Gonzales*, 386 F.Supp.2d 66, 75 (D.Conn. 2005)(“Section 2709(c) is subject to strict scrutiny not only because it is a prior restraint, but also because it is a content-based restriction”).

⁶⁶ *Playboy Entertainment*, 529 U.S. 803, 813 (2000).

⁶⁷ *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

⁶⁸ *FW/PHS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990)(“In *Freedman*, we determined that the following three procedural

Yet, the courts had been unwilling to classify as constitutionally suspect all instances of apparent prior restraint. The government in its presentation to the Second Circuit pointed to a number of instances where withstanding an apparent prior restraint regulators were held to a less demanding standard—citing cases involving pre-trial discovery gag orders, grand jury secrecy, the confidentiality surrounding inquiry into judicial misconduct, and the secrecy agreements signed by national security employees.⁶⁹

In fact, when the Supreme Court had assessed the First Amendment validity of a pre-trial discovery gag order, it concluded that the relevant questions were two: first, “whether the practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression;” and second, “whether the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved.”⁷⁰

The members of the Second Circuit panel could not agree on whether the NSL statute, as amended, constituted a prior restraint subject to strict scrutiny analysis, or should be judged by a somewhat less demanding standard. The lack of consensus proved of little consequence, because the government conceded that strict scrutiny analysis was appropriate,⁷¹ and because the panel agreed the result would be the same under the factor common to both standards—whether the restriction on expression crafted to protect the government’s interest was narrowly tailored for that purpose.⁷²

The government’s interest in national security is indisputably compelling.⁷³ Unwilling to read the NSL statutory procedure as a licensing scheme, the Second Circuit panel nevertheless concluded that “in the absence of Government-initiated judicial review, [the review statute,] §3511(b) [was] not narrowly tailored to conform to First Amendment protected standards.”⁷⁴ Moreover, the First Amendment demands real judicial review. The procedure must “place on the Government the burden to show a good reason to believe that disclosure may result in an enumerated harm, *i.e.* a harm related to an authorized investigation to protect against international terrorism or clandestine intelligence activities.”⁷⁵ Such judicial review may occur *ex parte* and *in camera*, but it may not be bound by the executive’s conclusive certification of harm feature of Section 3511. In the eyes of the court, there is no meaningful judicial review “of the decision of the Executive Branch to prohibit speech if the position of the Executive Branch that speech would be harmful is ‘conclusive’ on the reviewing court, absent only a demonstration of bad faith.”⁷⁶ “To accept

safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of proof once in court”), citing *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965).

⁶⁹ *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876-77 (2d Cir. 2008) noting the government contentions based on *Seattle Times Co. v. Rhinehard*, 467 U.S. 20 (1984)(pre-trial discovery); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979)(grand jury); *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994)(judicial misconduct); *United States v. Snepp*, 897 F.2d 138 (4th Cir. 1990)(CIA employees); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972)(same).

⁷⁰ *Seattle Times Co. v. Rhinehard*, 467 U.S. at 32.

⁷¹ *John Doe, Inc. v. Mukasey*, 549 F.3d at 878.

⁷² *Id.*

⁷³ *John Doe, Inc. v. Mukasey*, 549 F.3d at 878, citing *Haig v. Agee*, 453 U.S. 280, 307 (1981).

⁷⁴ *John Doe, Inc. v. Mukasey*, 549 F.3d at 880-81.

⁷⁵ *Id.* at 881.

⁷⁶ *Id.* at 882.

deference to that extraordinary degree would be to reduce strict scrutiny to no scrutiny, save only in the rarest of situations where bad faith could be shown,” it concluded.⁷⁷

Yet the court envisioned a procedure under which NSL secrecy provision might survive:

We deem it beyond the authority of a court to “interpret” or “revise” the NSL statutes to create the constitutionally required obligation of the Government to initiate judicial review of a nondisclosure requirement. However, the Government might be able to assume such an obligation without additional legislation....

If the Government uses the suggested reciprocal notice procedure as a means of initiating judicial review, there appears to be no impediment to the Government’s including notice of a recipient’s opportunity to contest the nondisclosure requirement in an NSL. If such notice is given, time limits on the nondisclosure requirement pending judicial review, as reflected in *Freedman*, would have to be applied to make the review procedure constitutional. We would deem it to be within our judicial authority to conform subsection 2709(c) to First Amendment requirements, by limiting the duration of the nondisclosure requirement, absent a ruling favorable to the Government upon judicial review, to the 10-day period in which the NSL recipient decides whether to contest the nondisclosure requirement, the 30-day period in which the Government considers whether to seek judicial review, and a further period of 60 days in which a court must adjudicate the merits, unless special circumstances warrant additional time. If the NSL recipient declines timely to precipitate Government-initiated judicial review, the nondisclosure requirement would continue, subject to the recipient’s existing opportunities for annual challenges to the nondisclosure requirement provided by subsection 3511(b). If such an annual challenge is made, the standards and burden of proof that we have specified for an initial challenge would apply, although the Government would not be obliged to initiate judicial review.⁷⁸

Given the possibility of constitutional application, the court saw no reason to invalidate the NSL statute and Section 3511(b) in toto. The exclusive presumptions of Section 3511 made binding on the review court could not survive, the court declared, but the First Amendment finds no offense in the remainder of the two sections except “to the extent that they fail to provide for Government-initiated judicial review. The Government can respond to this partial invalidation ruling by using the suggested reciprocal notice procedure.”⁷⁹

On remand under the procedure suggested by the Court of Appeals, the government submitted the declaration of the senior FBI official concerning the continued need for secrecy concerning the NSL. Following an ex parte, in camera hearing, the district court concluded the government had met its burden, but granted the plaintiff’s motion for an unclassified, redacted summary of the FBI declaration.⁸⁰

The possibility of a conflicting view arose in the Ninth Circuit. A federal district court there agreed with the Second Circuit that the NSL confidentiality and judicial review provisions were constitutionally suspect.⁸¹ Yet it could not agree with the Second Circuit that NSL authority might be used if the confidentiality and judicial review provisions were implemented to satisfy

⁷⁷ *Id.*

⁷⁸ *Id.* at 883-84.

⁷⁹ *Id.* at 884.

⁸⁰ *Doe v. Holder*, 665 F.Supp.2d 426, 432-34 (S.D.N.Y. 2009); see also *Doe v. Holder*, 703 F.Supp.2d 313 (S.D.N.Y. 2010).

⁸¹ *In re National Security Letter*, 930 F.Supp.2d 1064, 1081 (N.D.Cal. 2013)(“[T]he Court concludes that the nondisclosure provision of 18 U.S.C. §2709(c) violates the First Amendment and 18 U.S.C. §3511(b)(2) and (b)(3) violate the First Amendment and separation of powers principles”).

constitutional demands. The statutory language was too clear and the congressional intent too apparent for the court to feel it could move in the opposite direction. It declared,

The statutory provisions at issue—as written, adopted and amended by Congress in the face of a constitutional challenge—are not susceptible to narrowing conforming constructions to save their constitutionality ... [I]n amending and reenacting the statute as it did, Congress was concerned with giving the government the broadest powers possible to issue NSL nondisclosure orders and to preclude searching judicial review of the same ... [T]he sorts of multiple inferences required to save the provisions at issue are not only contrary to evidence of Congressional intent, but also contrary to the statutory language and structure of the statutory provisions actually enacted by Congress.⁸²

The district court also concluded that, if the confidentiality and judicial review provisions could not survive, neither could the remainder of the NSL authority.⁸³ The court, therefore, barred the government from using the communication NSL statute’s authority and from enforcing the related NSL confidentiality provisions. It stayed the order pending appeal.

Recommendations of the President’s Review Group

In the wake of leaks relating to the National Security Agency’s (NSA’s) purported bulk meta-data collection program under the Foreign Intelligence Surveillance Act (FISA), the President established a Review Group on Intelligence and Communications Technology (Group). The Group released its report and recommendations on December 12, 2013.⁸⁴ Several of its recommendations addressed NSLs. NSL procedures, it said, should more closely resemble those of FISA “business record” court orders (“§215 orders”). Thus, it proposed that (1) the courts approve all NSLs except in emergency circumstances; (2) Section 215 orders be used only in international terrorism and international espionage investigations; (3) the NSL statutes be amended to track Section 215 minimization requirements; (4) both NSLs and Section 215 orders should be subject to greater oversight and public reporting requirements.

Section 215 of the USA PATRIOT Act had amended the business records provisions of FISA.⁸⁵ As amended, FISA authorizes court orders for the production of tangible items held by individuals and private entities in certain foreign intelligence cases.⁸⁶ Section 215 orders provide government access to business records in certain intelligence investigations; NSLs also provide government access to business records in certain intelligence investigations. FISA court judges issue Section 215 orders; FBI officials issue NSLs. The Group recommended that “statutes that authorize the issuance of National Security Letters should be amended to permit the issuance of National Security Letters only upon a *judicial finding* that: (1) the government has reasonable grounds to believe that the particular information sought is relevant to an authorized investigation

⁸² *Id.* at 1080.

⁸³ *Id.* at 1081 (internal citations omitted) (“The Court also finds that the unconstitutional nondisclosure provisions are not severable. There is ample evidence, in the manner in which the statutes were adopted and subsequently amended after their constitutionality was first rejected in *Doe v. Ashcroft* and *Doe v. Gonzales*, that Congress fully understood the issues at hand and the importance of the nondisclosure provisions. Moreover, it is hard to imagine how the substantive NSL provisions—which are important for national security purposes—could function if no recipient were required to abide by the nondisclosure provisions which have been issued in approximately 97% of the NSLs issued”).

⁸⁴ *Liberty and Security in a Changing World: Report and Recommendations of the President’s Review Group on Intelligence and Communications Technology (Report)*, available at http://www.whitehouse.gov/sites/default/files/docs/2013-12-12-reg_final_report.pdf.

⁸⁵ P.L. 107-56, 115 Stat. 287 (2001).

⁸⁶ 50 U.S.C. 1861.

intended to protect ‘against international terrorism or clandestine intelligence activities’ and (2) like a subpoena, the order is reasonable in focus, scope, and breadth.”⁸⁷ It explained that

For all the well-established reasons for requiring neutral and detached judges to decide when government investigators may invade an individual’s privacy, there is a strong argument that NSLs should not be issued by the FBI itself.... [F]oreign intelligence investigations are especially likely to implicate highly sensitive and personal information and to have potentially severe consequences for the individuals under investigation. We are unable to identify a principled reason why NSLs should be issued by FBI officials when [Section] 215 orders and orders for pen registers and trap-and-trace surveillance must be issued by the [FISA court].⁸⁸

Without further adjustments, the proposed Section 215-NSL symmetry would be less than perfect. Requiring judicial approval of both would be a first step in that direction. The Group, however, did not suggest that the FISA court should approve all NSLs. It readily conceded that the 60-a-day rate at which the FBI issues NSLs would overwhelm the FISA court as currently constituted.⁸⁹ It offered several alternative solutions, including enlarging the FISA court, but endorsed none of the alternatives.⁹⁰

The Group would also eliminate the gap that exists between when an NSL may be issued and when a Section 215 order may be issued. Section 215 orders are available for investigations in addition to the international terrorism or international espionage inquiries that support NSL issuance under most statutes.⁹¹ Beyond terrorism and espionage, Section 215 orders are available to secure “foreign intelligence information” as long as it does not relate to a “U.S. person.”⁹² Foreign intelligence information encompasses information about foreign nations and foreign entities useful for the conduct of U.S. foreign relations.⁹³ The Group endeavored to create compatibility by shaving off the difference; it would allow Section 215 orders only in conjunction with international terrorism or espionage investigations.⁹⁴

⁸⁷ *Report, Recommendation (R.) 2*, at 24.

⁸⁸ *Report*, at 92-3.

⁸⁹ *Id.* at 93 (“We recognize, however, that there are legitimate practical and logistical concerns. At the time, a requirement that NSLs must be approved by the FISC would pose a serious logistical challenge. The FISC has only a small number of judges and the FBI currently issues an average of nearly 60 NSLs per day. It is not realistic to expect the FISC, as currently constituted, to handle the burden”).

⁹⁰ *Id.* (“Several solutions may be possible, including a significant expansion in the number of FISC judges, the creation within the FISC of several federal magistrate judges to handle NSL requests, and use of the Classified Information Procedures Act to enable other federal courts to issue NSLs”).

⁹¹ 18 U.S.C. 2709(international terrorism or espionage); 12 U.S.C. 3414(a)(5)(A)(international terrorism or espionage); 15 U.S.C. 1681u(a)(international terrorism or espionage); 15 U.S.C. 1681v(international terrorism); 50 U.S.C. 3162(law enforcement investigation, counterintelligence inquiry, or security determination).

⁹² 50 U.S.C. 1861(a).

⁹³ 50 U.S.C. 1891(e)(“‘Foreign intelligence information’ means- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against- (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to- (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States”).

⁹⁴ *Report*, R. 1, at 24(“We recommend that [§]215 should be amended to authorize the Foreign Intelligence Surveillance Court to issue a [§]215 order compelling a third party to disclose otherwise private information about particular individuals only if: (1) it finds that the government has reasonable grounds to believe that the particular information sought is relevant to an authorized investigation intended to protect ‘against international terrorism or

Section 215 orders are subject to limitations as to how the information they generate may be used, stored, shared, and kept or disposed of (minimization standards).⁹⁵ The Group considered “the oversight and minimization requirements governing the use of NSLs ... much less rigorous than those imposed in the use of [Section] 215 orders.”⁹⁶ Consequently, it recommended that NSLs be held to Section 215 standards.⁹⁷

Finally, the Group made a series of recommendations with an eye to greater oversight and public disclosure. Their proposals would apply to NSLs, Section 215 orders, trap and trace orders,⁹⁸ Section 702 orders,⁹⁹ and orders of the kind that gave rise to the purported NSA bulk meta-data collection. It suggested as a general matter that information concerning these authorities should be available in detail to Congress and the public, consistent with the need to protect classified information.¹⁰⁰ More specifically, it recommended that nondisclosure orders (gag orders) issued to communications carriers and other recipients should be limited to cases involving human safety, maintaining congenial diplomatic relations, or similar substantial governmental concerns.¹⁰¹ The Group would allow recipients to periodically disclose the number of times they had received NSLs, Section 215 orders, and the like.¹⁰² It also proposed that the government be required to issue regular public reports on the use of such orders.¹⁰³

clandestine intelligence activities’ and (2) like a subpoena, the order is reasonable in focus, scope, and breadth”).

⁹⁵ 50 U.S.C. 1861(g).

⁹⁶ *Report*, at 92.

⁹⁷ *Report*, R. 3 (“We recommend that all statutes authorizing the use of National Security Letters should be amended to require the use of the same oversight, minimization, retention, and dissemination standards that currently govern the use of [Section] 215 orders”).

⁹⁸ Pen registers and trap and trace devices are essentially surreptitious caller ID devices. Orders for their installation and use, however, supply an additional benefit. The providers to whom they are addressed may also be instructed to provide the government with “any mechanisms and sources of payment for such [customer] service including the number of any credit card or bank account utilized for payment for such service,” 50 U.S.C. 1842(d)(2)(C)(i)(VII).

⁹⁹ Section 702 of FISA authorizes the court to approve procedures for targeting the communications of non-U.S. persons (foreign nationals and foreign entities) located overseas, 50 U.S.C. 1881a.

¹⁰⁰ *Report*, R. 7 at 26 (“We recommend that legislation should be enacted requiring that detailed information about authorities such as those involving National Security Letters, section 215 business records, section 702, pen register and trap-and-trace, and the section 215 bulk telephony meta-data program should be made available on a regular basis to Congress and the American people to the greatest extent possible, consistent with the need to protect classified information. With respect to authorities and programs whose existence is unclassified, there should be a strong presumption of transparency to enable the American people and their elected representatives independently to assess the merits of the programs for themselves”).

¹⁰¹ *Report*, R. 8 at 26-27 (“We recommend that: (1) legislation should be enacted providing that, in the use of National Security Letters, section 215 orders, pen register and trap-and-trace orders, 702 orders, and similar orders directing individuals, businesses, or other institutions to turn over information to the government, non-disclosure orders may be issued only upon a judicial finding that there are reasonable grounds to believe that disclosure would significantly threaten the national security, interfere with an ongoing investigation, endanger the life or physical safety of any person, impair diplomatic relations, or put at risk some other similarly weighty government or foreign intelligence interest; (2) nondisclosure orders should remain in effect for no longer than 180 days without judicial re-approval; and (3) nondisclosure orders should never be issued in a manner that prevents the recipient of the order from seeking legal counsel in order to challenge the order’s legality”).

¹⁰² *Report*, R. 9 at 27 (“We recommend that legislation should be enacted providing that, even when nondisclosure orders are appropriate, recipients of National Security Letters, section 215 orders, pen register and trap-and-trace orders, section 702 orders, and similar orders issued in programs whose existence is unclassified may publicly disclose on a periodic basis general information about the number of such orders they have received, the number they have complied with, the general categories of information they have produced, and the number of users whose information they have produced in each category, unless the government makes a compelling demonstration that such disclosures would endanger the national security”).

¹⁰³ *Report*, R.10 at 27 (“We recommend that, building on current law, the government should publicly disclose on a

USA FREEDOM Act

Congress did not adopt the recommendations of the President's Review Group, but the USA FREEDOM Act addresses the judicially perceived NSL shortcomings in other ways. It eliminates the prospect of Section 215-like bulk metadata collection under NSL authority. It revises the procedures for the issuance of NSL nondisclosure provisions and for judicial review of their issuance. Finally, it augments existing reporting requirements for greater transparency.

Each of the NSL statutes now includes a requirement that the NSL demand be limited to specifically identified information rather than insisting on delivery of record information for all of a recipient's customers.¹⁰⁴

The USA FREEDOM Act handles the judicial review of nondisclosure orders with complementary amendments to the NSL statutes and to Section 3511. Nondisclosure orders under the amended NSL statutes are available only if the issuance officials notify recipients of their right to judicial review and certify that disclosure may result in a danger to national security; in interference with a criminal, counterterrorism, or counterintelligence investigation; in interference with diplomatic relations; or in the endangerment of an individual's physical safety.¹⁰⁵

A nondisclosure order notwithstanding, a recipient may disclose to those necessary for execution of the order, to an attorney for related legal advice, and to anyone else approved by the issuance agency.¹⁰⁶ The exception is conditioned upon the recipient's notification of the issuance agency and advising those he tells of the nondisclosure requirements binding each of them.¹⁰⁷

regular basis general data about National Security Letters, section 215 orders, pen register and trap-and-trace orders, section 702 orders, and similar orders in programs whose existence is unclassified, unless the government makes a compelling demonstration that such disclosures would endanger the national security").

¹⁰⁴ 12 U.S.C. 3414(a)(2) ("... [T]he Government authority [issuing the NSL] shall submit to the financial institution ... a term that specifically identifies a customer, entity, or account to be used as the basis for the production of disclosure of financial records"); 15 U.S.C. 1681u ("... [A] consumer reporting agency shall furnish to the Federal Bureau of Investigation ... information ... when presented with a written request for that information that includes a term that specifically identifies a consumer or account to be used as the basis for the production of that information"); 15 U.S.C. 1681v ("... [A] consumer reporting agency shall furnish ... information ... when presented with a written certification by such government agency that such information is necessary for the agency's conduct of such investigation, activity or analysis and that includes a term that specifically identifies a consumer or account to be used as the basis for the production of such information"); 18 U.S.C. 2709(b) ("The Director of the Federal Bureau of Investigation ... may, using a term that specifically identifies a person, entity, telephone number, or account as the basis for the request – (1) request ...").

¹⁰⁵ 12 U.S.C. 3414(d)(2), (c)(1)(B) ("The requirements of subparagraph (A) [issuance of NSL nondisclosure order] shall apply if the Director of the Federal Bureau of Investigation ... certifies that the absence of a prohibition of disclosure under this subsection may result in – (i) a danger to the national security of the United States; (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person"); see also, 15 U.S.C. 1681u(e)(2), (d)(i)(B); 15 U.S.C. 1681v(d)(2), (c)(1)(B); 18 U.S.C. 2709(d)(2), (c)(1)(B); 50 U.S.C. 3162(c)(2), (b)(1)(B).

¹⁰⁶ 15 U.S.C. 1681u(d)(2)(A) ("A consumer reporting agency that receives a request under subsection (a) or (b) or an order under subsection (c), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to – (i) those persons to whom disclosure is necessary in order to comply with the request; (ii) an attorney in order to obtain legal advice or assistance regarding the request; or (iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director"); see also, 12 U.S.C. 3414(c)(2)(A); 15 U.S.C. 1681v(d)(2), (c)(1)(B); 18 U.S.C. 2709(d)(2), (c)(1)(B); 50 U.S.C. 3162(c)(2), (b)(1)(B).

¹⁰⁷ 15 U.S.C. 1681v(c)(2)(B), (C), (D) ("(B) Application. – A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request under subsection (a) is issued in the same manner as the person to whom the request is issued. (C) Notice – Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the

The USA FREEDOM Act amends Section 3511 so that the issuing agency must petition for judicial review upon request of the recipient.¹⁰⁸ The petition must include a statement of specific facts evidencing the risks that warrant a nondisclosure order—a risk of a danger to national security, of interference with diplomatic relations or with particular investigation, or of physical injury.¹⁰⁹ The court must issue the order if it finds reason to believe disclosure “during the applicable time period” would bring with it such risks.¹¹⁰

The reference to “the applicable time period” is the only indication of the permissible tenure of a nondisclosure order. The phrase seems to contemplate that the petition will propose a time limit on any nondisclosure order or at least the court will impose one. The legislative history suggests that this reflects the practice immediately prior to enactment of the USA FREEDOM Act.¹¹¹ Of course, the government was operating at the time under the pre-USA FREEDOM Act version of Section 3511, which afforded the opportunity for annual (and only annual) judicial review, and in the shadow of the Second Circuit’s *John Doe, Inc.* decision.¹¹²

The USA FREEDOM Act’s final NSL adjustment occurs in the area of public disclosures. It directs the Director of National Intelligence to post on his website annually the number of NSLs

person of the applicable nondisclosure requirement. (D) Identification of Disclosure Recipients – At the request of the head of the government agency described in subsection (a) or a designee, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the head of such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request”); see also, 12 U.S.C. 3414(c)(2)(B), (C), (D); 15 U.S.C. 1681u(d)(2)(B), (C), (D); 18 U.S.C. 2709(c)(2)(B), (C), (D); 50 U.S.C. 3162(b)(2)(B), (C), (D).

¹⁰⁸ 18 U.S.C. 3511(b)(1)(B)(“Not later than 30 days after the date of receipt of a notification under subparagraph (A) [that an NSL recipient requests judicial review], the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order is doing business or in the district court of the United States for any judicial district within which the authorized investigation that is the basis for the request is being conducted. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement”).

¹⁰⁹ 18 U.S.C. 3511(b)(2).

¹¹⁰ 18 U.S.C. 3561(b)(3)(“A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in – (A) a danger to the national security of the United States; (B) interference with a criminal, counterterrorism, or counterintelligence investigation; (C) interference with diplomatic relations; or (D) danger to the life or physical safety of any person”).

¹¹¹ H.Rept. 114-109, at 25 (2015)(“In remarks accompanying the issuance of PPD-28, President Obama directed the Attorney General ‘to amend how we use National Security Letters so that [their] secrecy will not be indefinite, and will terminate within a fixed time unless the government demonstrates a real need for further secrecy.’ In January 215, as part of its Signals Intelligence Reform 2015 Anniversary Report, the Director of National Intelligence announced that: ‘In response to the President’s new direction, the FBI will now presumptively terminate a National Security Letter nondisclosure order at the earlier of 3 years after the opening of a fully predicated investigation or the investigation’s close’”).

¹¹² 18 U.S.C. 3511(b)(3)(2012 ed.) (“If the petition [for judicial review] is filed one year or more after the [NSL] request ... The Federal Bureau of Investigation ... shall either terminate the nondisclosure requirement or re-certify.... If the court denies a petition for an order modifying or setting aside a nondisclosure requirement ... the recipient shall be precluded for a period of one year from filing another petition”). This opportunity for an annual judicial review was part and parcel of the procedure the Second Circuit felt would satisfy constitutional demands, see e.g., *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 883-84 (2d Cir. 2008)(emphasis added)(“We deem it beyond the authority of a court to ‘interpret’ or ‘revise’ the NSL statutes to create the constitutionally required obligation of the Government to initiate judicial review of a nondisclosure requirement. However, the Government might be able to assume such an obligation without additional legislation.... If the NSL recipient declines timely to precipitate Government-initiated judicial review, the nondisclosure requirement would continue, *subject to the recipient’s existing opportunities for annual challenges to the nondisclosure requirement provided by subsection 3511(b)*”).

issued and the number of requests covered by those NSLs during the previous year.¹¹³ It also permits a recipient of a FISA order or an NSL to publicly report, in one of four statutorily defined alternatives, the total number of such FISA orders and NSLs and the total number of customers covered by such orders or requests.¹¹⁴

Current NSL Attributes

Addressees and Certifying Officials

The five NSL statutes share a number of common attributes, although each has its own individual features as well. They are most distinctive with respect to the nature of the businesses to which they may be addressed. The Electronic Communication Privacy Act NSLs are addressed to communications providers.¹¹⁵ Those issued under the authority of the Right to Financial Privacy Act may be directed to financial institutions, such as banks, credit unions, credit card companies, car dealers, jewelers and a number of entities that are likely to be involved large cash transactions.¹¹⁶ The Fair Credit Reporting Act NSLs may be addressed to consumer credit reporting agencies.¹¹⁷ Recipients of the National Security Act NSLs may include financial institutions and consumer credit reporting agencies, as well as any commercial entity with information concerning an agency employee's travel.¹¹⁸

FBI officials are authorized to provide the initial certification required for issuance of an NSL under any of the five statutes. In three instances, the authority is exclusive; in the other two, it is enjoyed by other federal officials as well. In the case of the Electronic Communications Privacy Act NSL section, the Right to Financial Privacy Act section, and one of the Fair Credit Report Act NSL sections, issuance requires the certification of either the Director of the FBI, a senior FBI official (no lower than the Deputy Assistant Director), or the Special Agent in Charge of an FBI field office.¹¹⁹

Certifying officials under the other statutes are described more broadly. The National Security Act NSL section contemplates certification by officials from a wider range of agencies; the second Fair Credit Reporting Act NSL section allows certification by both a wider range of agencies and a wider range of officials. Senior officials no lower than Assistant Secretary or Assistant Director of an agency whose employee with access to classified material is under investigation may certify a National Security Act NSL request.¹²⁰ A designated supervisory official of any agency "authorized to conduct investigations of, or intelligence or counterintelligence activities and analysis related to, international terrorism" may certify an NSL request under the second, more recent Fair Credit Reporting Act section.¹²¹

¹¹³ 50 U.S.C. 1873(b)(6).

¹¹⁴ 50 U.S.C. 1874. The USA FREEDOM Act's legislative history indicates that the section was modeled after the existing agreement between various technology companies and the Department of Justice, H.Rept. 114-109, at 26-7 (2015).

¹¹⁵ 18 U.S.C. 2709.

¹¹⁶ 12 U.S.C. 3414(a), (d).

¹¹⁷ 15 U.S.C. 1681u(a), 1681v(a).

¹¹⁸ 50 U.S.C. 3162(a).

¹¹⁹ 18 U.S.C. 2709 (b); 12 U.S.C. 3414(a)(5)(A); 15 U.S.C. 1681u(b).

¹²⁰ 50 U.S.C. 3162(a)(3).

¹²¹ 15 U.S.C. 1681v(a).

Purpose, Standards, Information Covered

Although variously phrased, the purpose for each of the NSLs is to acquire information related to the requesting agency's national security concerns. The most common statement of purpose is "to protect against international terrorism or clandestine intelligence activities."¹²² The more recent of the Fair Credit Reporting Act NSL sections simply indicates that the information must be sought for the requesting intelligence agency's investigation, activity, or analysis.¹²³ The National Security Act NSL authority is available to conduct law enforcement investigations, counterintelligence inquiries, and security determinations.¹²⁴ As to standards, the Electronic Communications Privacy Act authorizes NSLs for relevant information.¹²⁵ The same standard may apply to the others, which are a little more cryptic, authorizing NSLs when the information is "sought for"¹²⁶ or "is necessary"¹²⁷ for the statutory purpose.

The communications NSL provision and the earlier of the two credit agency NSL statutes are fairly specific in their descriptions of the information that may be requested through an NSL. An Electronic Communications Privacy Act NSL may request a customer's name, address, length of service, and billing records.¹²⁸ The older of the two Fair Credit Report Act sections authorizes an NSL to acquire name, address or former address, place or former place of employment, and the name and address of any financial institution with which the consumer has or once had an account.¹²⁹ The Right to Financial Privacy Act NSL provision covers the financial records of a financial institution's customers;¹³⁰ the second and more recent Fair Credit Reporting Act NSL provision covers a consumer reporting agency's consumer reports and "all other" consumer information in its files.¹³¹ The National Security Act provision is at once the most inclusive and the most restricted. It authorizes NSLs for financial information and records and consumer reports held by any financial agency, institution, holding company, or consumer reporting agency, and for travel information held by any commercial entity.¹³² On the other hand, it is the only provision that limits the information provided to that pertaining to the target of the agency's investigation and to information of a kind whose disclosure the target has previously approved.¹³³

Confidentiality

Prior to their amendment in the 109th Congress, the NSL statutes generally featured an open-ended confidentiality clause. The communications NSL provision for example declared, "No wire or electronic communication service provider, or officer, or employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to

¹²² 18 U.S.C. 2709(b); 12 U.S.C. 3414(a)(5)(A); 15 U.S.C. 1681u(b).

¹²³ 15 U.S.C. 1681v(a).

¹²⁴ 50 U.S.C. 3162(a)(1).

¹²⁵ 18 U.S.C. 2709(b).

¹²⁶ 15 U.S.C. 1681u(a); 12 U.S.C. 3414(a)(5)(A).

¹²⁷ 15 U.S.C. 1681v; 50 U.S.C. 3162(a).

¹²⁸ 18 U.S.C. 2709(b).

¹²⁹ 15 U.S.C. 1681u(a),(b).

¹³⁰ 12 U.S.C. 3414(a)(5)(A).

¹³¹ 15 U.S.C. 1681v(a).

¹³² 50 U.S.C. 3162(a)(1).

¹³³ 50 U.S.C. 3162(a)(2),(3).

information or records under this section.”¹³⁴ The statutes did not indicate whether a recipient might consult an attorney in order to ascertain his rights and obligations, or whether the clause might ever be lifted. It was this silence in the face of a seemingly absolute, permanent nondisclosure command that the early *Doe* courts found constitutionally unacceptable¹³⁵ and that perhaps led to the reconstruction of the NSL confidentiality requirements.

After amendment, secrecy is not absolutely required. Rather, NSL recipients are bound to secrecy only upon the certification of the requesting agency—and the agreement of the court should the recipient seek, or ask that the requesting agency to seek, judicial review—that disclosure of the request or response might result in a danger to national security; might interfere with diplomatic relations or with a criminal, counterterrorism, or counterintelligence investigation; or might endanger the physical safety of an individual.¹³⁶

A recipient may disclose the request to those necessary to comply with the request; to an attorney the recipient, consulted for related legal advice or assistance; and to others with the government’s approval.¹³⁷ In doing so, the recipient must advise them of the secrecy requirements.¹³⁸ Aside from its attorney and at the agency’s election, the recipient must identify for the requester those to whom it has disclosed the request.¹³⁹

If an NSL contains a nondisclosure notice, it must advise the recipient of its right to seek, or to have the agency seek, judicial review. At the recipient’s request, the issuing agency must petition the court for review, stating the specific facts that support its belief that disclosure might result in one or more of the statutorily identified adverse consequences.¹⁴⁰ If the court agrees that such a risk may exist, it must issue a nondisclosure order.¹⁴¹

Failure to honor a nondisclosure order is punishable as contempt of court,¹⁴² and if committed knowingly and with the intent to obstruct an investigation or related judicial proceedings is punishable by imprisonment for not more than five years and/or a fine of not more than \$250,000 (not more than \$500,000 for an organization).¹⁴³

¹³⁴ 18 U.S.C. 2709(c) (2000 ed.); see also, 12 U.S.C. 3414(a)(5)(D) (2000 ed.); 15 U.S.C. 1681u(d) (2000 ed.); 15 U.S.C. 1681v(c) (2002 Supp.); 50 U.S.C. 436(b) (2000 ed.).

¹³⁵ *Doe v. Ashcroft*, 334 F.Supp.2d 471, 522 (S.D.N.Y. 2004). and *Doe v. Gonzales*, 386 F.Supp.2d 66, 78-81 (D.Conn. 2005).

¹³⁶ 18 U.S.C. 2709(c)(1); 12 U.S.C. 3414(c)(1); 15 U.S.C. 1681u(d)(1); 15 U.S.C. 1681v(c)(1); 50 U.S.C. 3162(b)(1); 18 U.S.C. 3511(b)(3).

¹³⁷ 18 U.S.C. 2709(c)(2)(A); 12 U.S.C. 3414(c)(2)(A); 15 U.S.C. 1681u(d)(2)(A); 15 U.S.C. 1681v(c)(2)(A); 50 U.S.C. 3162(b)(2)(A).

¹³⁸ 18 U.S.C. 2709(c)(2)(C); 12 U.S.C. 3414(c)(2)(C); 15 U.S.C. 1681u(d)(2)(C); 15 U.S.C. 1681v(c)(2)(C); 50 U.S.C. 3162(b)(2)(C).

¹³⁹ 18 U.S.C. 2709(c)(2)(D); 12 U.S.C. 3414(c)(2)(D); 15 U.S.C. 1681u(d)(2)(D); 15 U.S.C. 1681v(c)(2)(D); 50 U.S.C. 3162(b)(2)(D).

¹⁴⁰ 18 U.S.C. 3511(b)(2)(“An application for a nondisclosure order or extension thereof ... containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in (A) a danger to the national security of the United States; (b) interference with a criminal, counterterrorism, or counterintelligence investigation; (C) interference with diplomatic relations; or (D) danger to the life or physical safety of any person”). Rather than trigger an agency petition, a recipient may petition the court directly for the judicial review, in which case the agency is required to respond with the specific facts that justify nondisclosure, *id.*

¹⁴¹ 18 U.S.C. 3511(b)(3). The same procedure applies when an agency moves to extend an expiring nondisclosure order.

¹⁴² 18 U.S.C. 402 (punishable by imprisonment for not more than 6 months and/or a fine of not more than \$1,000).

¹⁴³ 18 U.S.C. 1510(e), 3571, 3559.

Judicial Review and Enforcement

In addition to authority to review and set aside NSL nondisclosure requirements, the federal courts enjoy jurisdiction to review and enforce the underlying NSL requests. Recipients may petition and be granted an order modifying or setting aside an NSL, if the court finds that compliance would be unreasonable, oppressive, or otherwise unlawful.¹⁴⁴ The standard is reminiscent of the one used for subpoenas issued under the Federal Rules of Criminal Procedure. There a subpoena may be modified or quashed if compliance would be unreasonable or oppressive.¹⁴⁵ The Rule affords protection against undue burdens and protects privileged communications.¹⁴⁶

Compliance with a particular NSL might be unduly burdensome in some situations, but the circumstances under which NSLs are used suggest few federally recognized privileges. The Rule also imposes a relevancy requirement, but in the context of a grand jury investigation a motion to quash will be denied unless it can be shown that “there is no reasonable possibility that the category of materials the Government seeks will produce information relevant” to the investigation.¹⁴⁷ The authority to modify or set aside an NSL that is unlawful affords the court an opportunity to determine whether the NSL in question complies with the statutory provisions under which it was issued. On the other hand, the court’s authority may be invoked to enforce the NSL against a recalcitrant recipient and here to failure to comply thereafter is punishable as contempt of court.¹⁴⁸

Dissemination

Attorney General guidelines govern the sharing of information acquired in response to NSLs under two statutes.¹⁴⁹ A third, the older of the two Fair Credit Report Act sections, limits dissemination to sharing within the FBI, with other agencies to the extent necessary to secure approval of a foreign counterintelligence investigation, or with military investigators when the information concerns a member of the Armed Forces.¹⁵⁰ The National Security Act authorizes dissemination of NSL information to the agency of the employee under investigation, to the Justice Department for law enforcement or counterintelligence purposes, or to another federal agency if the information is clearly relevant to its mission.¹⁵¹ The more recent Fair Credit Reporting Act NSL section has no explicit provision on restricting dissemination.¹⁵²

¹⁴⁴ 18 U.S.C. 3511(a).

¹⁴⁵ F.R.Crim.P. 17(c)(2).

¹⁴⁶ 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE §275 (Crim. 3d ed. 2000).

¹⁴⁷ *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991).

¹⁴⁸ 18 U.S.C. 3511(c); 402.

¹⁴⁹ 12 U.S.C. 3414(a)(5)(B)(“The Federal Bureau of Investigation may disseminate information obtained pursuant to this paragraph only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency”); see also, 18 U.S.C. 2709(d).

¹⁵⁰ 15 U.S.C. 1681u(f).

¹⁵¹ 50 U.S.C. 3162(e).

¹⁵² 15 U.S.C. 1681v.

Liability, Fees and Oversight

Since judicial enforcement is a feature new to all but one of the NSL statutes,¹⁵³ the statutes might be expected to include other incentives to overcome recipient resistance. Three offer immunity from civil liability for recipients who comply in good faith,¹⁵⁴ and two offer fees or reimbursement to defer the costs of compliance.¹⁵⁵

The confidentiality that necessarily surrounds NSL requests could give rise to concerns of governmental overreaching. Consequently, regular reports on the use of NSL authority must be made to the congressional intelligence and judiciary committees and in some instances to the banking committees.¹⁵⁶ Moreover, Section 119 of the USA PATRIOT Improvement and Reauthorization Act instructs the Inspector General of the Department of Justice to audit and to report to the judiciary and intelligence committees as to the Department's use of the authority in the years following expansion of the authority in the USA PATRIOT Act. The section also directs the Attorney General and the Director of National Intelligence to report to Congress on the feasibility of establishing minimization requirements for the NSLs. The USA FREEDOM Act instructs the Director of National Intelligence to publish annual on his website the number of NSLs issued in previous year.¹⁵⁷ It authorizes recipients to periodically disclose publicly the number of NSLs and requests they have received as well.¹⁵⁸

¹⁵³ In addition to the newly added judicial enforcement mechanism in 28 U.S.C. 3511, the earlier Fair Credit Report Act NSL sections had a limited judicial enforcement subsection, as it had for some time, 15 U.S.C. 1681u(c).

¹⁵⁴ 15 U.S.C. 1681u(k), 1681v(e); 50 U.S.C. 3162(c)(2).

¹⁵⁵ 15 U.S.C. 1681u(e); 50 U.S.C. 3162(d).

¹⁵⁶ P.L. 109-177, §118(a)(adding the judiciary committees as recipients of all NSL required reports); 12 U.S.C. 3414(a)(5)(C)(intelligence committees); 18 U.S.C. 2709 (intelligence and judiciary committees); 15 U.S.C. 1681u(h)(intelligence and banking committees), 1681v(judiciary, intelligence, and banking committees).

¹⁵⁷ 50 U.S.C. 1873.

¹⁵⁸ 50 U.S.C. 1874.

The chart that follows summarizes the differences among the five NSL sections:

Table 1. Profile of the Current NSL Statutes

NSL statute	18 U.S.C. 2709	12 U.S.C. 3414	15 U.S.C. 1681u	15 U.S.C. 1681v	50 U.S.C. 3162
Addressee	communications providers	financial institutions	consumer credit agencies	consumer credit agencies	financial institutions, consumer credit agencies, travel agencies
Certifying officials	senior FBI officials and SACs	senior FBI officials and SACs	senior FBI officials and SACs	supervisory official of an agency investigating, conducting intelligence activities relating to or analyzing int'l terrorism	senior officials no lower than Ass't Secretary or Ass't Director of agency w/ employees w/ access to classified material
Information covered	identified customer's name, address, length of service, and billing info	identified customer financial records	identified consumer's name, address, former address, place and former place of employment	all information relating to an identified consumer	all financial information relating to consenting, identified employee
Standard/Purpose	relevant to an investigation to protect against int'l terrorism or clandestine intelligence activities	sought for foreign counter-intelligence purposes to protect against int'l terrorism or clandestine intelligence activities	sought for an investigation to protect against int'l terrorism or clandestine intelligence activities	necessary for the agency's investigation, activities, or analysis relating to int'l terrorism	necessary to conduct a law enforcement investigation, counter-intelligence inquiry or security determination
Dissemination	only per Att'y Gen. guidelines	only per Att'y Gen. guidelines	w/i FBI, to secure approval for intell. investigation, to military investigators when inform. relates to military member	no statutory provision	only to agency of employee under investigation, DOJ for law enforcement or intell. purposes, or fed. agency when clearly relevant to mission
Immunity/fees	no provisions	no provisions	fees; immunity for good faith compliance with an NSL	immunity for good faith compliance with an NSL	reimbursement; immunity for good faith compliance with an NSL

Source: Congressional Research Service, based on the statutes cited in the table.

Appendixes

(USA FREEDOM Act Amendments in italics)

12 U.S.C. 3414 (text)

- (a) Access to financial records for certain intelligence and protective purposes
- (1) Nothing in this chapter (except sections 3415, 3417, 3418, and 3421¹ of this title) shall apply to the production and disclosure of financial records pursuant to requests from-
- (A) a Government authority authorized to conduct foreign counter- or foreign positive-intelligence activities for purposes of conducting such activities;
 - (B) the Secret Service for the purpose of conducting its protective functions (18 U.S.C. 3056; 18 U.S.C. 3056A, Public Law 90–331, as amended); or
 - (C) a Government authority authorized to conduct investigations of, or intelligence or counterintelligence analyses related to, international terrorism for the purpose of conducting such investigations or analyses.
- (2) In the instances specified in paragraph (1), the Government authority shall submit to the financial institution the certificate required in section 3403(b) of this title signed by a supervisory official of a rank designated by the head of the Government authority *and a term that specifically identifies a customer, entity, or account to be used as the basis for the production and disclosure of financial records.*
- (3)(A) If the Government authority described in paragraph (1) or the Secret Service, as the case may be, certifies that otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person, no financial institution, or officer, employee, or agent of such institution, shall disclose to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the Government authority or the Secret Service has sought or obtained access to a customer's financial records.
- (B) The request shall notify the person or entity to whom the request is directed of the nondisclosure requirement under subparagraph (A).
- (C) Any recipient disclosing to those persons necessary to comply with the request or to an attorney to obtain legal advice or legal assistance with respect to the request shall inform such persons of any applicable nondisclosure requirement. Any person who receives a disclosure under this subsection shall be subject to the same prohibitions on disclosure under subparagraph (A).
- (D) At the request of the authorized Government authority or the Secret Service, any person making or intending to make a disclosure under this section shall identify to the requesting official of the authorized Government authority or the Secret Service the person to whom such disclosure will be made or to whom such disclosure was made prior to the request, except that nothing in this section shall require a person to inform the requesting official of the authorized Government authority or the Secret Service of the identity of an attorney to whom disclosure was made or will be made to obtain legal advice or legal assistance with respect to the request for financial records under this subsection.
- (4) The Government authority specified in paragraph (1) shall compile an annual tabulation of the occasions in which this section was used.
- (5)(A) Financial institutions, and officers, employees, and agents thereof, shall comply with a request for a customer's or entity's financial records made pursuant to this subsection by the Federal Bureau of Investigation when the Director of the Federal Bureau of Investigation (or

the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director) certifies in writing to the financial institution that such records are sought for foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(B) The Federal Bureau of Investigation may disseminate information obtained pursuant to this paragraph only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(C) On the dates provided in section 3106 of title 50, the Attorney General shall fully inform the congressional intelligence committees (as defined in section 3003 of title 50) concerning all requests made pursuant to this paragraph.

(b) Emergency access to financial records

(1) Nothing in this chapter shall prohibit a Government authority from obtaining financial records from a financial institution if the Government authority determines that delay in obtaining access to such records would create imminent danger of-

- (A) physical injury to any person;
- (B) serious property damage; or
- (C) flight to avoid prosecution.

(2) In the instances specified in paragraph (1), the Government shall submit to the financial institution the certificate required in section 3403(b) of this title signed by a supervisory official of a rank designated by the head of the Government authority.

(3) Within five days of obtaining access to financial records under this subsection, the Government authority shall file with the appropriate court a signed, sworn statement of a supervisory official of a rank designated by the head of the Government authority setting forth the grounds for the emergency access. The Government authority shall thereafter comply with the notice provisions of section 3409(c) of this title.

(4) The Government authority specified in paragraph (1) shall compile an annual tabulation of the occasions in which this section was used.

(c) *Prohibition of certain disclosure*

(1) Prohibition

(A) In general. If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no financial institution that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under subsection (a).

(B) Certification. The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in-

- (i) a danger to the national security of the United States;*
- (ii) interference with a criminal, counterterrorism, or counterintelligence investigation;*
- (iii) interference with diplomatic relations; or*
- (iv) danger to the life or physical safety of any person.*

(2) Exception

(A) In general. A financial institution that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to-

- (i) those persons to whom disclosure is necessary in order to comply with the request;*
- (ii) an attorney in order to obtain legal advice or assistance regarding the request; or*
- (iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.*

(B) Application. A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (a) in the same manner as the person to whom the request is issued.

(C) Notice. Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients. At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(d) Judicial review

(1) In general. A request under subsection (a) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511 of title 18.

(2) Notice. A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1).

(e) Definition of “financial institution”

For purposes of this section, and sections 3415 and 3417 of this title insofar as they relate to the operation of this section, the term “financial institution” has the same meaning as in subsections (a)(2) and (c)(1) of section 5312 of title 31, except that, for purposes of this section, such term shall include only such a financial institution any part of which is located inside any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the United States Virgin Islands.

18 U.S.C. 2709 (text)

(a) Duty to Provide.—A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

(b) Required Certification.—The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may, *using a term that specifically identifies a person, entity, telephone number, or account as the basis for a request—*

- (1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities,*

provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and

(2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Prohibition of Certain Disclosure.-

(1) Prohibition.-

(A) In general.-If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

(B) Certification.-The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in-

- (i) a danger to the national security of the United States;*
- (ii) interference with a criminal, counterterrorism, or counterintelligence investigation;*
- (iii) interference with diplomatic relations; or*
- (iv) danger to the life or physical safety of any person.*

(2) Exception.-

(A) In general.-A wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to-

- (i) those persons to whom disclosure is necessary in order to comply with the request;*
- (ii) an attorney in order to obtain legal advice or assistance regarding the request; or*
- (iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.*

(B) Application.-A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (b) in the same manner as the person to whom the request is issued.

(C) Notice.-Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients.-At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(d) Judicial Review.-

(1) *In general.*—A request under subsection (b) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511.

(2) *Notice.*—A request under subsection (b) shall include notice of the availability of judicial review described in paragraph (1).

(e) *Dissemination by Bureau.*—The Federal Bureau of Investigation may disseminate information and records obtained under this section only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(f) *Requirement That Certain Congressional Bodies Be Informed.*—On a semiannual basis the Director of the Federal Bureau of Investigation shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, and the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, concerning all requests made under subsection (b) of this section.

(g) *Libraries.*—A library (as that term is defined in section 213(1) of the Library Services and Technology Act (20 U.S.C. 9122(1)), the services of which include access to the Internet, books, journals, magazines, newspapers, or other similar forms of communication in print or digitally by patrons for their use, review, examination, or circulation, is not a wire or electronic communication service provider for purposes of this section, unless the library is providing the services defined in section 2510(15) (“electronic communication service”) of this title.

15 U.S.C. 1681u (text)

(a) *Identity of financial institutions.* Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 3401 of title 12) at which a consumer maintains or has maintained an account, to the extent that information is in the files of the agency, when presented with a written request for that *information that includes a term that specifically identifies a consumer or account to be used as the basis for the production of that information*, signed by the Director of the Federal Bureau of Investigation, or the Director’s designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this section. The Director or the Director’s designee may make such a certification only if the Director or the Director’s designee has determined in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) *Identifying information.* Notwithstanding the provisions of section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request *that includes a term that specifically identifies a consumer or account to be used as the basis for the production of that information*, signed by the Director or the Director’s designee in a position not lower than Deputy Assistant Director at Bureau

headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this subsection. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Court order for disclosure of consumer reports. Notwithstanding section 1681b of this title or any other provision of this subchapter, if requested in writing by the Director of the Federal Bureau of Investigation, or a designee of the Director in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, a court may issue an order *ex parte*, *which shall include a term that specifically identifies a consumer or account to be used as the basis for the production of the information*, directing a consumer reporting agency to furnish a consumer report to the Federal Bureau of Investigation, upon a showing in camera that the consumer report is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States. The terms of an order issued under this subsection shall not disclose that the order is issued for purposes of a counterintelligence investigation.

(d) *Prohibition of certain disclosure*

(1) *Prohibition*

(A) *In general. If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (e) is provided, no consumer reporting agency that receives a request under subsection (a) or (b) or an order under subsection (c), or officer, employee, or agent thereof, shall disclose or specify in any consumer report, that the Federal Bureau of Investigation has sought or obtained access to information or records under subsection (a), (b), or (c).*

(B) *Certification. The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in-*

- (i) a danger to the national security of the United States;*
- (ii) interference with a criminal, counterterrorism, or counterintelligence investigation;*
- (iii) interference with diplomatic relations; or*
- (iv) danger to the life or physical safety of any person.*

(2) *Exception*

(A) *In general. A consumer reporting agency that receives a request under subsection (a) or (b) or an order under subsection (c), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to-*

- (i) those persons to whom disclosure is necessary in order to comply with the request;*
- (ii) an attorney in order to obtain legal advice or assistance regarding the request; or*
- (iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.*

(B) *Application. A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request under*

subsection (a) or (b) or an order under subsection (c) is issued in the same manner as the person to whom the request is issued.

(C) Notice. Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients. At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(e) Judicial review

(1) In general. A request under subsection (a) or (b) or an order under subsection (c) or a non-disclosure requirement imposed in connection with such request under subsection (d) shall be subject to judicial review under section 3511 of title 18.

(2) Notice. A request under subsection (a) or (b) or an order under subsection (c) shall include notice of the availability of judicial review described in paragraph (1).

(f) Payment of fees

The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.

(g) Limit on dissemination

The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

(h) Rules of construction

Nothing in this section shall be construed to prohibit information from being furnished by the Federal Bureau of Investigation pursuant to a subpoena or court order, in connection with a judicial or administrative proceeding to enforce the provisions of this subchapter. Nothing in this section shall be construed to authorize or permit the withholding of information from the Congress.

(i) Reports to Congress

(1) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence and the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Select Committee on Intelligence and the Committee on Banking, Housing, and Urban Affairs of the Senate concerning all requests made pursuant to subsections (a), (b), and (c) of this section.

(2) In the case of the semiannual reports required to be submitted under paragraph (1) to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, the submittal dates for such reports shall be as provided in section 3106 of title 50.

(j) Damages

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of-

- (1) \$100, without regard to the volume of consumer reports, records, or information involved;
- (2) any actual damages sustained by the consumer as a result of the disclosure;
- (3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and
- (4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

(k) Disciplinary actions for violations

If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.

(l) Good-faith exception

Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reliance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(m) Limitation of remedies

Notwithstanding any other provision of this subchapter, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

(n) Injunctive relief

In addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered.

15 U.S.C. 1681v (text)

(a) Disclosure. Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish a consumer report of a consumer and all other information in a consumer's file to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct or such investigation, activity or analysis *and that includes a term that specifically identifies a consumer or account to be used as the basis for the production of such information.*

(b) Form of certification. The certification described in subsection (a) of this section shall be signed by a supervisory official designated by the head of a Federal agency or an officer of a Federal agency whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate.

(c) Prohibition of certain disclosure

(1) Prohibition

(A) In general. If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no consumer reporting agency that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose or specify in any consumer report, that a government agency described in subsection (a) has sought or obtained access to information or records under subsection (a).

(B) Certification. The requirements of subparagraph (A) shall apply if the head of the government agency described in subsection (a), or a designee, certifies that the absence of a prohibition of disclosure under this subsection may result in-

- (i) a danger to the national security of the United States;*
- (ii) interference with a criminal, counterterrorism, or counterintelligence investigation;*
- (iii) interference with diplomatic relations; or*
- (iv) danger to the life or physical safety of any person.*

(2) Exception

(A) In general. A consumer reporting agency that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to-

- (i) those persons to whom disclosure is necessary in order to comply with the request;*
- (ii) an attorney in order to obtain legal advice or assistance regarding the request; or*
- (iii) other persons as permitted by the head of the government agency described in subsection (a) or a designee.*

(B) Application. A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request under subsection (a) is issued in the same manner as the person to whom the request is issued.

(C) Notice. Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients. At the request of the head of the government agency described in subsection (a) or a designee, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the head or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(d) Judicial review

(1) In general. A request under subsection (a) or a non-disclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511 of title 18.

(2) Notice. A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1).

(e) Rule of construction. Nothing in section 1681u of this title shall be construed to limit the authority of the Director of the Federal Bureau of Investigation under this section.

(f) Safe harbor. Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or other information pursuant to this section in good-faith reliance upon a certification of a government agency pursuant to the provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(g) Reports to Congress. (1) On a semi-annual basis, the Attorney General shall fully inform the Committee on the Judiciary, the Committee on Financial Services, and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary, the Committee on Banking, Housing, and Urban Affairs, and the Select Committee on Intelligence of the Senate concerning all requests made pursuant to subsection (a).

(2) In the case of the semiannual reports required to be submitted under paragraph (1) to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, the submittal dates for such reports shall be as provided in section 3106 of title 50.

50 U.S.C. 3162 (text)

(a) Generally

(1) Any authorized investigative agency may request from any financial agency, financial institution, or holding company, or from any consumer reporting agency, such financial records, other financial information, and consumer reports as may be necessary in order to conduct any authorized law enforcement investigation, counterintelligence inquiry, or security determination. Any authorized investigative agency may also request records maintained by any commercial entity within the United States pertaining to travel by an employee in the executive branch of Government outside the United States.

(2) Requests may be made under this section where—

(A) the records sought pertain to a person who is or was an employee in the executive branch of Government required by the President in an Executive order or regulation, as a condition of access to classified information, to provide consent, during a background investigation and for such time as access to the information is maintained, and for a period of not more than three years thereafter, permitting access to financial records, other financial information, consumer reports, and travel records; and

(B)(i) there are reasonable grounds to believe, based on credible information, that the person is, or may be, disclosing classified information in an unauthorized manner to a foreign power or agent of a foreign power;

(ii) information the employing agency deems credible indicates the person has incurred excessive indebtedness or has acquired a level of affluence which cannot be explained by other information known to the agency; or

(iii) circumstances indicate the person had the capability and opportunity to disclose classified information which is known to have been lost or compromised to a foreign power or an agent of a foreign power.

(3) Each such request—

(A) shall be accompanied by a written certification signed by the department or agency head or deputy department or agency head concerned, or by a senior official designated for this purpose by the department or agency head concerned (whose rank shall be no lower than Assistant Secretary or Assistant Director), and shall certify that—

(i) the person concerned is or was an employee within the meaning of paragraph

(2)(A);

(ii) the request is being made pursuant to an authorized inquiry or investigation and is authorized under this section; and

(iii) the records or information to be reviewed are records or information which the employee has previously agreed to make available to the authorized investigative agency for review;

(B) shall contain a copy of the agreement referred to in subparagraph (A)(iii);

- (C) shall identify specifically or by category the records or information to be reviewed; and
- (D) shall inform the recipient of the request of the prohibition described in subsection (b) of this section.

(b) Prohibition of certain disclosure

(1) Prohibition

(A) In general

If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (c) is provided, no governmental or private entity that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose to any person that an authorized investigative agency described in subsection (a) has sought or obtained access to information under subsection (a).

(B) Certification

The requirements of subparagraph (A) shall apply if the head of an authorized investigative agency described in subsection (a), or a designee, certifies that the absence of a prohibition of disclosure under this subsection may result in-

- (i) a danger to the national security of the United States;*
- (ii) interference with a criminal, counterterrorism, or counterintelligence investigation;*
- (iii) interference with diplomatic relations; or*
- (iv) danger to the life or physical safety of any person.*

(2) Exception

(A) In general

A governmental or private entity that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to-

- (i) those persons to whom disclosure is necessary in order to comply with the request;*
- (ii) an attorney in order to obtain legal advice or assistance regarding the request; or*
- (iii) other persons as permitted by the head of the authorized investigative agency described in subsection (a) or a designee.*

(B) Application

A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (a) in the same manner as the person to whom the request is issued.

(C) Notice

Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients

At the request of the head of an authorized investigative agency described in subsection (a), or a designee, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the head of the authorized investigative agency or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(c) Judicial review

(1) In general

A request under subsection (a) or a nondisclosure requirement imposed in connection with such request under subsection (b) shall be subject to judicial review under section 3511 of title 18.

(2) Notice

A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1).

(d)(1) Notwithstanding any other provision of law (other than section 6103 of title 26), an entity receiving a request for records or information under subsection (a) of this section shall, if the request satisfies the requirements of this section, make available such records or information within 30 days for inspection or copying, as may be appropriate, by the agency requesting such records or information.

(2) Any entity (including any officer, employee, or agent thereof) that discloses records or information for inspection or copying pursuant to this section in good faith reliance upon the certifications made by an agency pursuant to this section shall not be liable for any such disclosure to any person under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(e) Any agency requesting records or information under this section may, subject to the availability of appropriations, reimburse a private entity for any cost reasonably incurred by such entity in responding to such request, including the cost of identifying, reproducing, or transporting records or other data.

(f) An agency receiving records or information pursuant to a request under this section may disseminate the records or information obtained pursuant to such request outside the agency only—

- (1) to the agency employing the employee who is the subject of the records or information;
- (2) to the Department of Justice for law enforcement or counterintelligence purposes; or
- (3) with respect to dissemination to an agency of the United States, if such information is clearly relevant to the authorized responsibilities of such agency.

(g) Nothing in this section may be construed to affect the authority of an investigative agency to obtain information pursuant to the Right to Financial Privacy Act (12 U.S.C. 3401 et seq.) or the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.).

18 U.S.C. 1510 (text)

* * *

(e) Whoever, having been notified of the applicable disclosure prohibitions or confidentiality requirements of section 2709(c)(1) of this title, section 626(d)(1) or 627(c)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681u(d)(1) or 1681v(c)(1)), section 1114(a)(3)(A) or 1114(a)(5)(D)(i) of the Right to Financial Privacy Act (12 U.S.C. 3414(a)(3)(A) or 3414(a)(5)(D)(i)), or section 802(b)(1) of the National Security Act of 1947 (50 U.S.C. [3162](b)(1)), knowingly and with the intent to obstruct an investigation or judicial proceeding violates such prohibitions or requirements applicable by law to such person shall be imprisoned for not more than five years, fined under this title, or both.

18 U.S.C. 3511 (text)

(a) The recipient of a request for records, a report, or other information under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947 may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the request. The court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful.

(b) Nondisclosure.-

(1) In general.- (A) Notice.-If a recipient of a request or order for a report, records, or other information under section 2709 of this title, section 626 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 1681v), section 1114 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414), or section 802 of the National Security Act of 1947 (50 U.S.C. 3162), wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government or file a petition for judicial review in any court described in subsection (a).

(B) Application.-Not later than 30 days after the date of receipt of a notification under subparagraph (A), the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order is doing business or in the district court of the United States for any judicial district within which the authorized investigation that is the basis for the request is being conducted. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

(C) Consideration.-A district court of the United States that receives a petition under subparagraph (A) or an application under subparagraph (B) should rule expeditiously, and shall, subject to paragraph (3), issue a nondisclosure order that includes conditions appropriate to the circumstances.

(2) Application contents.-An application for a nondisclosure order or extension thereof or a response to a petition filed under paragraph (1) shall include a certification from the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of Investigation, or a designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the Department of Justice, the head or deputy head of the department, agency, or instrumentality, containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in-

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

(3) Standard.-A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in-

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

(c) In the case of a failure to comply with a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947, the Attorney General may invoke the aid of any district court of the United States within the jurisdiction in which the investigation is carried on or the person or entity resides, carries on business, or may be found, to compel compliance with the request. The court may issue an order requiring the person or entity to comply with the request. Any failure to obey the order of the court may be punished by the court as contempt

thereof. Any process under this section may be served in any judicial district in which the person or entity may be found.

(d) In all proceedings under this section, subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent an unauthorized disclosure of a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947. Petitions, filings, records, orders, and subpoenas must also be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947.

(e) In all proceedings under this section, the court shall, upon request of the government, review ex parte and in camera any government submission or portions thereof, which may include classified information.

50 U.S.C. 1873 (text)

* * *

(b) Mandatory reporting by Director of National Intelligence

Except as provided in subsection (d), the Director of National Intelligence shall annually make publicly available on an Internet Web site a report that identifies, for the preceding 12-month period-

* * *

(6) the total number of national security letters issued and the number of requests for information contained within such national security letters.

(c) Timing

The annual reports required by subsections (a) and (b) shall be made publicly available during April of each year and include information relating to the previous calendar year.

* * *

(e) Definitions

In this section: ... (3) ... The term “national security letter” means a request for a report, records, or other information under- (A) section 2709 of title 18; (B) section 3414(a)(5)(A) of title 12; (C) subsection (a) or (b) of section 1681u of title 15; or (D) section 1681v(a) of title 15....

50 U.S.C. 1874 (text)

(a) Reporting. A person subject to a nondisclosure requirement accompanying an order or directive under this chapter or a national security letter may, with respect to such order, directive, or national security letter, publicly report the following information using one of the following structures:

(1) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply into separate categories of-

(A) the number of national security letters received, reported in bands of 1000 starting with 0–999;

- (B) the number of customer selectors targeted by national security letters, reported in bands of 1000 starting with 0–999;
 - (C) the number of orders or directives received, combined, under this chapter for contents, reported in bands of 1000 starting with 0–999;
 - (D) the number of customer selectors targeted under orders or directives received, combined, under this chapter for contents ¹ reported in bands of 1000 starting with 0–999;
 - (E) the number of orders received under this chapter for noncontents, reported in bands of 1000 starting with 0–999; and
 - (F) the number of customer selectors targeted under orders under this chapter for noncontents, reported in bands of 1000 starting with 0–999, pursuant to-
 - (i) subchapter III;
 - (ii) subchapter IV with respect to applications described in section 1861(b)(2)(B) of this title; and
 - (iii) subchapter IV with respect to applications described in section 1861(b)(2)(C) of this title.
- (2) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply into separate categories of-
- (A) the number of national security letters received, reported in bands of 500 starting with 0–499;
 - (B) the number of customer selectors targeted by national security letters, reported in bands of 500 starting with 0–499;
 - (C) the number of orders or directives received, combined, under this chapter for contents, reported in bands of 500 starting with 0–499;
 - (D) the number of customer selectors targeted under orders or directives received, combined, under this chapter for contents, reported in bands of 500 starting with 0–499;
 - (E) the number of orders received under this chapter for noncontents, reported in bands of 500 starting with 0–499; and
 - (F) the number of customer selectors targeted under orders received under this chapter for noncontents, reported in bands of 500 starting with 0–499.
- (3) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply in the separate categories of-
- (A) the total number of all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 250 starting with 0–249; and
 - (B) the total number of customer selectors targeted under all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 250 starting with 0–249.
- (4) An annual report that aggregates the number of orders, directives, and national security letters the person was required to comply with into separate categories of-
- (A) the total number of all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 100 starting with 0–99; and
 - (B) the total number of customer selectors targeted under all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 100 starting with 0–99.
- (b) Period of time covered by reports. (1) A report described in paragraph (1) or (2) of subsection (a) shall include only information-
- (A) relating to national security letters for the previous 180 days; and

- (B) relating to authorities under this chapter for the 180-day period of time ending on the date that is not less than 180 days prior to the date of the publication of such report, except that with respect to a platform, product, or service for which a person did not previously receive an order or directive (not including an enhancement to or iteration of an existing publicly available platform, product, or service) such report shall not include any information relating to such new order or directive until 540 days after the date on which such new order or directive is received.*
- (2) A report described in paragraph (3) of subsection (a) shall include only information relating to the previous 180 days.*
- (3) A report described in paragraph (4) of subsection (a) shall include only information for the 1-year period of time ending on the date that is not less than 1 year prior to the date of the publication of such report.*
- (c) Other forms of agreed to publication. Nothing in this section prohibits the Government and any person from jointly agreeing to the publication of information referred to in this subsection in a time, form, or manner other than as described in this section.*
- (d) Definitions. In this section:*
- (1) Contents. The term “contents” has the meaning given that term under section 2510 of title 18.*
- (2) National security letter. The term “national security letter” has the meaning given that term under section 1872 of this title.*

P.L. 109-177, Section 118 (text)

Reports on National Security Letters.

(a) Existing Reports—Any report made to a committee of Congress regarding national security letters under section 2709(c)(1) of title 18, United States Code, sections 626(d) or 627(c) of the Fair Credit Reporting Act (15 U.S.C. 1681u(d) or 1681v(c)), section 1114(a)(3) or 1114(a)(5)(D) of the Right to Financial Privacy Act (12 U.S.C. 3414(a)(3) or 3414(a)(5)(D)), or section 802(b) of the National Security Act of 1947 (50 U.S.C. [3162](b)) shall also be made to the Committees on the Judiciary of the House of Representatives and the Senate.

* * *

(c) Report on Requests for National Security Letters-

(1) IN GENERAL- In April of each year, the Attorney General shall submit to Congress an aggregate report setting forth with respect to the preceding year the total number of requests made by the Department of Justice for information concerning different United States persons under—

(A) section 2709 of title 18, United States Code (to access certain communication service provider records), excluding the number of requests for subscriber information;

(B) section 1114 of the Right to Financial Privacy Act (12 U.S.C. 3414) (to obtain financial institution customer records);

(C) section 802 of the National Security Act of 1947 (50 U.S.C. [3162]) (to obtain financial information, records, and consumer reports);

(D) section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681u) (to obtain certain financial information and consumer reports); and

(E) section 627 of the Fair Credit Reporting Act (15 U.S.C. 1681v) (to obtain credit agency consumer records for counterterrorism investigations).

(2) UNCLASSIFIED FORM- The report under this section shall be submitted in unclassified form.

(d) National Security Letter Defined- In this section, the term ‘national security letter’ means a request for information under one of the following provisions of law:

(1) Section 2709(a) of title 18, United States Code (to access certain communication service provider records).

(2) Section 1114(a)(5)(A) of the Right to Financial Privacy Act (12 U.S.C. 3414(a)(5)(A)) (to obtain financial institution customer records).

(3) Section 802 of the National Security Act of 1947 (50 U.S.C.[3162]) (to obtain financial information, records, and consumer reports).

(4) Section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681u) (to obtain certain financial information and consumer reports).

(5) Section 627 of the Fair Credit Reporting Act (15 U.S.C. 1681v) (to obtain credit agency consumer records for counterterrorism investigations).

P.L. 109-177, Section 119 (text)

Audit of Use of National Security Letters.

(a) Audit—The Inspector General of the Department of Justice shall perform an audit of the effectiveness and use, including any improper or illegal use, of national security letters issued by the Department of Justice.

(b) Requirements- The audit required under subsection (a) shall include—

- (1) an examination of the use of national security letters by the Department of Justice during calendar years 2003 through 2006;
- (2) a description of any noteworthy facts or circumstances relating to such use, including any improper or illegal use of such authority; and
- (3) an examination of the effectiveness of national security letters as an investigative tool, including—

- (A) the importance of the information acquired by the Department of Justice to the intelligence activities of the Department of Justice or to any other department or agency of the Federal Government;
- (B) the manner in which such information is collected, retained, analyzed, and disseminated by the Department of Justice, including any direct access to such information (such as access to ‘raw data’) provided to any other department, agency, or instrumentality of Federal, State, local, or tribal governments or any private sector entity;
- (C) whether, and how often, the Department of Justice utilized such information to produce an analytical intelligence product for distribution within the Department of Justice, to the intelligence community (as such term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))), or to other Federal, State, local, or tribal government departments, agencies, or instrumentalities;
- (D) whether, and how often, the Department of Justice provided such information to law enforcement authorities for use in criminal proceedings;
- (E) with respect to national security letters issued following the date of the enactment of this Act, an examination of the number of occasions in which the Department of Justice, or an officer or employee of the Department of Justice, issued a national security letter without the certification necessary to require the recipient of such letter to comply with the nondisclosure and confidentiality requirements potentially applicable under law; and
- (F) the types of electronic communications and transactional information obtained through requests for information under section 2709 of title 18, United States Code, including the types of dialing, routing, addressing, or signaling information obtained, and the procedures the Department of Justice uses if content information is obtained through the use of such authority.

(c) Submission Dates-

(1) PRIOR YEARS- Not later than one year after the date of the enactment of this Act, or upon completion of the audit under this section for calendar years 2003 and 2004, whichever is earlier, the Inspector General of the Department of Justice shall submit to the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate a report containing the results of the audit conducted under this subsection for calendar years 2003 and 2004.

(2) CALENDAR YEARS 2005 AND 2006- Not later than December 31, 2007, or upon completion of the audit under this subsection for calendar years 2005 and 2006, whichever is earlier, the Inspector General of the Department of Justice shall submit to the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate a report containing the results of the audit conducted under this subsection for calendar years 2005 and 2006.

(d) Prior Notice to Attorney General and Director of National Intelligence; Comments-

(1) NOTICE- Not less than 30 days before the submission of a report under subsections (c)(1) or (c)(2), the Inspector General of the Department of Justice shall provide such report to the Attorney General and the Director of National Intelligence.

(2) COMMENTS- The Attorney General or the Director of National Intelligence may provide comments to be included in the reports submitted under subsections (c)(1) or (c)(2) as the Attorney General or the Director of National Intelligence may consider necessary.

(e) Unclassified Form- The reports submitted under subsections (c)(1) or (c)(2) and any comments included under subsection (d)(2) shall be in unclassified form, but may include a classified annex.

(f) Minimization Procedures Feasibility- Not later than February 1, 2007, or upon completion of review of the report submitted under subsection (c)(1), whichever is earlier, the Attorney General and the Director of National Intelligence shall jointly submit to the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate a report on the feasibility of applying minimization procedures in the context of national security letters to ensure the protection of the constitutional rights of United States persons.

(g) National Security Letter Defined- In this section, the term ‘national security letter’ means a request for information under one of the following provisions of law:

- (1) Section 2709(a) of title 18, United States Code (to access certain communication service provider records).
- (2) Section 1114(a)(5)(A) of the Right to Financial Privacy Act (12 U.S.C. 3414(a)(5)(A)) (to obtain financial institution customer records).
- (3) Section 802 of the National Security Act of 1947 (50 U.S.C. 436) (to obtain financial information, records, and consumer reports).
- (4) Section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681u) (to obtain certain financial information and consumer reports).
- (5) Section 627 of the Fair Credit Reporting Act (15 U.S.C. 1681v) (to obtain credit agency consumer records for counterterrorism investigations).

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